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ABSTRACT

This comparative analysis of the constitutional status of freedom of speech in Great Britain and the United States focuses on four speech-related offenses--seditious libel, defamatory libel, blasphemous libel, and group libel or incitment to racial hatred. The analysis concentrates on the profound and rapid changes that issues related to freedom of speech have undergone recently in the two nations. The paper is presented in three major sections. In the opening section, the author presents definitions of each of the four offenses in Britain and the United States. In the second section, information is presented on the constitutional status of each offense in Britain and the United States, with emphasis on comparing the major issues of constitutional policy which have been raised in relation to each offense in the two nations. Examples of major issues discussed include insubordination in the armed forces, political agitation with intent to create a breach of the peace, criticism of individual public officials, and intent to stir up racial hatred by publishing or saying things against a section of the public distinguished by color, race, or ethnic or national origin. The final section offers conclusions based on the ways in which these and similar offenses have been viewed and treated recently in the two nations. A major conclusion is that British law emerges as more restrictive of freedom of speech, at least in a formal or doctrinal sense, than American law. Although the constitutional status of these freedoms in Britain may be entirely satisfactory in practice, the restrictions of a statutory or common law nature existing in Britain on these freedoms would be unconstitutional in the United States. (DB)

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Freedom of Speech---A Comparison of Recent U.S. and British Experience

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Abstract

Freedom of Speech---A Comparison of Recent

U.S. and British Experience

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This paper examines four offenses---seditious libel, defamatory libel, blasphemous libel, and group libel or incitement to racial hatred---and compares their constitutional status in British and American law.

British law emerges as more restrictive of freedom of speech and freedom of the press, at least in a formal or doctrinal sense, than American law. Practically speaking, the constitutional status of freedom of speech and freedom of the press in Britain may be entirely satisfactory. However, Britain has adopted or retained a variety of statutory or common law restrictions on freedom of speech and freedom of the press which clearly would not be constitutionally permissible in the United States.

Constitutional policy governing issues of freedom of speech and freedom of assembly is undergoing a variety of profound and rapid changes in Britain and the United States. The purpose of this paper is to examine four speech-related offenses---seditious libel, defamatory libel, blasphemous libel, and group libel (or incitement to racial hatred)---and to compare, as directly as possible, their constitutional status in Britain and the United States. The decision to examine such a broad and diverse set of offenses obviously precludes the possibility of delving very deeply into any one. Nevertheless, an attempt will be made to sketch at least the principal constitutional issues or policy choices that arise in these areas and to examine the way in which these issues or choices have been perceived---and in some cases resolved---by policy-making institutions in Britain and the United States.

My discussion of each of these four offenses will begin with an attempt to define the substantive focus of the offense in Britain and the United States. Following that, I will approach the task of comparing the constitutional status of the offense in Britain and the United States by dividing the discussion into a series of sub-topics corresponding to what I perceive to be the major issues or choices of constitutional policy which are unavoidably raised by the offense.

I. Seditious Libel

In Britain, sedition or seditious libel is a common law offense. Potentially,

> [i]t embraces all those practices, whether by word, deed, or writing, which directly tend or have for their object to excite discontent or dissatisfaction; to excite ill-will between different classes of the Sovereign's subjects; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the government, the lawsor constitution of the realm, and generally all endeavors to

> promote public disorder...; or to incite people to unlawful associations, or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law, or to use any form of physical force in any public matter connected with the State....[1]

In addition, there are a small number of statutory offenses of incitement---e.g., Incitement to Mutiny Act 1787 (prohibiting "maliciously and advisedly endeavor[ing] to seduce [any sailor] from his...duty and allegiance to his Majesty"), Incitement to Disaffection Act 1934 (prohibiting "maliciously and advisedly endeavor[ing] to seduce any member of His Majesty's forces from his duty or allegiance"), Police Act 1964 (making it an offense "to cause... disaffection amongst the members of any police force"), and Aliens Restriction (Amendment) Act 1919 (making it an offense for an alien "to cause sedition or disaffection amongst any of His Majesty's forces...or amongst the civilian population" or "to promote industrial unrest in any industry in which he has not been bona fide engaged for at least two years")---and incitement of another to commit any offense is a common law misdemeanor.[2] The Law Commission in 1977 recommended abolition of the common law offense of sedition and repeal of the Incitement to Mutiny Act 1797 but also recommended creation of a new offense of conduct, in peacetime, aimed at the overthrow or supplanting of constitutional government by force.[3] Finally, the non-statutory preventive powers of the

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1 J. Archbold, Criminal Pleading, Evidence and Practice (36th ed. 1966), para. 3147. See also I. Brownlie, The Law Relating to Public Order 85-90 (1968).

2 See Brownlie, supra note 1, at 83-5.

3 Law Commission Working Paper No. 72, "Codification of the Criminal Law: Treason, Sedition and Allied Offenses" (1977). See also Note, "Reform of Offences Against the State," [1977] Crim. L. Rev. 505 (1977); Leigh, "Law Reform and the Law of Treason and Sedition," [1977] Pub. L. 128 (1977).

police include the power to order a meeting to disperse or a speaker to desist from speaking when they (the police) apprehend the possibility of a breach of the peace, and refusal to obey the police may constitute the offense of obstruction of the police in the execution of their duty[4] or may justify the police in committing what would otherwise be an assault as a means of enforcing their order to disperse or desist.[5]

In the United States, prosecutions for what I am broadly defining as "sedition" have been brought under laws against causing insubordination in the armed forces or obstructing the recruiting and enlistment service of the United States,[6] against advocating the "duty, necessity or propriety of overthrowing or overturning organized government by force or violence,"[7] against "advocat[ing]...the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence,"[8] and against "advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[9] In addition, at least one American case arguably based on activity constituting incitement of supporters as well as provocation

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4 Cf. Duncan v. Jones, [1936] 1 K.B. 218.

5 Cf. Humphries v. Connor [1864] 17 I.C.L.R. 1 (Ireland); O'Kelly v. Harvey, [1883] 14 L.R. 105 (Ireland).

6 Schenck v. United States, 249 U.S. 47, 49-50 (1919).

7 Gitlow v. New York, 268 U.S. 652, 654 (1925).

8 Dennis v. United States, 341 U.S. 494, 496 (1951).

9 Brandenburg v. Ohio, 395 U.S. 444, 444-5 (1969). See also Whitney v. California, 274 U.S. 357 (1927).

of opponents involved the conviction for disorderly conduct of a speaker who, in the words of the charge against him, was guilty of "ignoring and refusing to heed and obey reasonable police orders issued...to prevent a breach or breaches of the peace."[10]

In the past, therefore, the offense of sedition included activity such as exciting "discontent or dissatisfaction" or bringing the Sovereign or the government "into hatred or contempt."[11] In recent years, however, the activity punished as sedition in both Britain and the United States has tended to take the form of incitement to disaffection or insubordination, advocacy of overthrow of the government by force or violence, or incitement to violence or other unlawful activity. This fact does not reveal very much about the way in which the law was actually applied in either country, but it does indicate the broad contours of the crime of sedition or seditious libel itself.[12] It is useful to approach the constitutional issues raised by the application of the law by considering, in turn, the question of (1) the requirement of a breach of the peace, (2) the required connection between speech and action, (3) the intent requirement in sedition cases, and (4) the content of speech punishable as seditious libel.

A. The Requirement of a Breach of the Peace

In antiquated versions of the crime of sedition, the likelihood of a breach of the peace---that is, of physical disorder or violence---was by definition

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10 Feiner v. New York, 340 U.S. 315, 318-9 (1951).

11 Archbold, supra note 1.

12 The threat to constitutional rights posed by government prosecutions of defendants for defamatory libel of public officials is obviously closely related to the threat posed by government prosecutions of defendants for criticizing the government itself. However, consideration of the crime of defamatory libel is postponed until Part II infra.

irrelevant or else, if it was required, could be highly remote and still suffice to fulfil the requirements of the common law. Sedition in the form of incitement to disaffection does not in terms appear to require the likelihood of a breach of the peace, but rather the likelihood of the substantive evil of disaffection, and this may explain why incitement to disaffection has become a more or less specific and separate statutory offense in both English and American law. The crime of advocating overthrow of the government by force or violence invites a constitutional decision whether the likelihood of overthrow of the government by force or violence or other breach of the peace is a precondition of guilt. Finally, the crime of incitement to violence presumably requires the likelihood of violence, while the crime of incitement to "other unlawful activity" requires the likelihood of "other unlawful activity," whatever that may be.

British commentators emphasize that in Britain today the punishment of political agitation as seditious libel would require proof of the likelihood of a breach of the peace. However, they also emphasize the scarcity of real authority on the subject and the existence of contrary precedents.[13] In British sedition cases involving political agitation, the issue of whether a breach of the peace was likely has tended to be transmuted into the issue of whether the defendant did or did not have a seditious intention, with a seditious intention being defined as an intention to produce violence as opposed to other, more commendable results.[14] In British incitement to disorder cases, on the other hand, the issue of whether a breach of the peace was likely has

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13 Cf. Brownlie, supra note 1, at 87-8.

14 Cf. R. v. Burns, [1886] 16 Cox C.C. 355; R. v. Aldred, [1909] 22 Cox C.C. 1; R. v. Caunt (unreported, 1947). These cases are discussed in Section C infra.

tended to be transmuted into the issue of whether the apprehension of a breach of the peace on the part of the police was reasonable and the related issue of the degree of discretion to which the police are entitled, as a matter of constitutional law, in arriving at a conclusion that a breach of the peace was likely.[15]

In American law, the requirement of a breach of the peace has been used by the Supreme Court---or else has been unsuccessfully commended to the Supreme Court---as a device for narrowing the scope of laws whose purposes other than the punishment or deterrence of a breach of the peace are alleged to be unclear or to result in abridgment of freedom of speech for reasons which are insufficient to justify that constitutionally disfavored result. Thus, the Court has been urged on a number of occasions to condition the punishment of obscenity upon proof of the likelihood of violence or other unlawful activity, but a majority of the Court has always rejected this suggestion.[16] In its one and only encounter with the offense of "group libel" or "incitement to racial hatred," the Supreme Court, in Beauharnais v. Illinois, refused to condition punishment of the defendant upon proof of the likelihood of a breach of the peace,[17] but proof of such a likelihood has apparently gained de facto acceptance as a constitutional limitation on the punishment of incitement to racial hatred since that time.[18] Fin-

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15 Cf. Duncan v. Jones, [1936] 1 K.B. 218; Piddington v. Bates, [1961] 1 W.L.R. 162. These cases are discussed in Section B infra.

16 Cf. Roth v. United States, 354 U.S. 476, (1957); Miller v. California, 413 U.S. 15, (1973).

17 343 U.S. 250 (1952).

18 Cf. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), aff'g Collin v. Smith, 447 F.Supp. 676 (N.D. Ill. 1978). These cases are discussed in Part IV, Section A infra.

ally, the Supreme Court rejected the constitutional necessity of proving the likelihood of a breach of the peace in cases involving advocacy of overthrow of the government in Gitlow v. New York in 1927[19] but accepted the necessity of such proof, at least in principle, in Dennis v. United States in 1951.[20] In cases where the requirement of the likelihood of a breach of the peace has been accepted in principle or been taken for granted---e.g., in cases involving advocacy of overthrow of the government by force or violence or cases involving incitement to other kinds of violence---and in cases requiring the likelihood of a substantive evil, but not necessarily the substantive evil of violence or disorder---e.g., in cases involving incitement to insubordination or draft resistance---the issue, in American law, has been whether there exists a clear and present danger that speech will produce a specified substantive evil.

B. The Required Connection Between Speech and Action

In American law, the clear and present danger test, in cases in which it is appropriate, requires that for speech to be punishable, the illegal action that is alleged to result from the speech must be clearly connected to the speech and must be likely to occur quite soon after the speech. The modern restatement of the danger test, in Brandenburg v. Ohio, requires that "advocacy of the use of force or of law violation," to be punishable, must be "directed to inciting or producing imminent lawless action and [must be] likely to incite or produce such action."[21] Assuming that the first part of the Brandenburg test is a description of constitutionally unprotected speech content and

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[19] 268 U.S. 652 (1925).

[20] 341 U.S. 494 (1951).

[21] 395 U.S. 444, 447 (1969).

the second part is a description of the necessary connection between speech and action, punishable speech must be "likely to incite or produce [imminent lawless action]." In American law, application of the requirement of "imminent likelihood" or a "clear and present danger" has not always been strict or literal.[22] However, the modern version of the test is widely assumed to preclude the punishment of advocacy of illegal action---no matter how explicitly it is "directed to inciting or producing imminent lawless action"---unless it is also clearly "likely to incite or produce such action" in the immediate future.

In British law, the preoccupation of modern commentators is to establish that the crime of sedition does require the likelihood of a breach of the peace---as opposed to the likelihood of other results, such as "discontent" among citizens or feelings of "hatred or contempt" for the Sovereign---and as a result the issue of the nature of the connection between speech and action---the issue of the definition of "likelihood"---is not given much attention. Thus, Brownlie argues that "[t]he more modern and reliable approach [to sedition] requires the likelihood of breaches of the peace resulting from libel or conspiracy," but he refers in support of his point to the fact that Smith and Hogan[23] describe "the actus reus of the offence as the tendency in the words to incite public disorder."[24] In the case of ordinary or "street-corner" incitement, moreover, British courts have held that the police were

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22 Cf. Dennis v. United States, 341 U.S. 494, 509 (1951)("The damage which [attempts to overthrow the government] create both physically and politically to a nation makes it impossible to measure the validity [of application of the law to revolutionaries] in terms of the probability of success or the immediacy of a successful attempt.").

23 J.C. Smith and Brian Hogan, Criminal Law 580 (1965).

24 Brownlie, supra note 1, at 87-8.

entitled to order a speaker to desist from speaking and a meeting to disperse on the basis of their apprehension of a breach of the peace, even though their apprehension apparently was based primarily or exclusively on the fact that at the place in question and under similar circumstances an actual breach of the peace had occurred one year earlier.[25] In a subsequent case, Lord Parker emphasized that

> First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from which a constable could reasonably anticipate such a breach. Second, it is not enough that his contemplation is that there is a remote possibility; there must be a real possibility of a breach of the peace.[26]

Nevertheless, Brownlie contends that the meaning of Duncan and Piddington is that "the prosecution can in practice rely on a presumption that the view of the situation adopted by the police at the time is reasonable in law and is only subject to review in exceptional circumstances."[27] The American reports are not without examples of cases in which the Supreme Court or other appellate courts have upheld the decision of the police to intervene in a situation in which the likelihood of a breach of the peace was, objectively speaking, rather dubious.[28] Nevertheless, it seems fair to conclude that the requirement of a connection between speech and action has a more settled status in American con-

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25 Duncan v. Jones, [1936] 1 K.B. 218.

26 Piddington v. Bates, [1961] 1 W.L.R. 162,

27 Brownlie, supra note 1, at 21.

28 Cf. Feiner v. New York, 340 U.S. 315, 325-6 (1951)(Black, J., dissenting). Note that an appellate court can validate the decision of the police to intervene for at least two different reasons. First, the court can agree with the government that the decision of the police officer was in fact "reasonable." Second, the court can adopt an extremely deferential stance towards the decision of the police officer--which was, of course, based on first-hand knowledge--and can overturn that decision only if it is clearly or manifestly unreasonable.

constitutional law than in British constitutional law. Moreover, the modern meaning of the "danger test" in American law is that speech which is alleged to be responsible for producing illegal action is not punishable unless the connection between the speech and the action is both clear in fact and close in time.

C. The Intent Requirement in Sedition Cases

Examination of the role of intent in speech offenses---including the offense of seditious libel---reveals considerable ambivalence and uncertainty in British and American constitutional law. In principle, constitutional authorities---legislatures and courts---have been obliged to resolve two intent-related questions: (1) whether it is necessary, in a speech offense such as seditious libel, for the prosecution to prove any intent other than an intent to publish, and (2) whether, if it is necessary to prove some additional intent, that intent must be to cause a breach of the peace or may be an intent to cause other results. Assuming these questions are resolved---on way or the other---constitutional authorities immediately face two further questions: (1) the question of what types of evidence should be admissible to prove intent, and (2) the question of what degree of culpability the prosecution should be required to prove in order to establish guilt in connection with a speech offense.

In modern American law, it appears that proof of intent to publish material which does in fact constitute a seditious libel will not suffice to make out a case of seditious libel and that proof of additional intent is necessary.[29] In cases in which the substantive evil for which the speech is alleged to be re-

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[29] In the past, proof of intent to publish material which did in fact constitute seditious libel, without more, may have sufficed. See, e.g., Z. Chafee, Free Speech in the United States (1941); L. Levy, Legacy of Supression (1964).

sponsible is other than violence, intent to cause that substantive evil is an element of the offense.[30] In cases in which the substantive evil for which speech is alleged to be responsible is violence, theoretically an intent to cause violence should be an element of the offense. There may, however, be no direct evidence of intent, and thus intent will have to be inferred from other evidence in the case. Even if such evidence is confined to the content of the speech---which must, after Brandenburg, be "directed to inciting or producing imminent lawless action"---and the circumstances in which the speech is delivered---which must, after Brandenburg, be such that the speech is "likely to incite or produce such action"---the key participants in the process of adjudication---the trial judge, the jury, and the appellate court or courts---retain substantial decision-making latitude. In particular, it may be possible to draw a wide variety of inferences about the intent of a speaker from the content of his or her speech[31] or the circumstances in which it is delivered.[32] Moreover, the outcome of any case will be crucially affected by the choice of what degree of culpability the prosecutor is required to prove in order to es-

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30 Cf. Debs v. United States, 219 U.S. 211, 216 (1919)("the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service...and unless the defendant had the specific intent to do so in his mind").

31 Cf. id. at 214-5 ("the jury [was warranted in finding] that one purpose of [the defendant's speech], whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting").

32 Cf. Whitney v. California, 274 U.S. 357, 367-8 (1927)(acceptance of defendant's argument that "she had no purpose of helping to create an instrument of terrorism and violence" by organizing a convention that took on "the character of criminal syndicalism...over her protest" was "foreclosed by the verdict of the jury" and moreover would require the Supreme Court to "[disregard the fact] that...she...remained at the convention, without protest, until its close").

tablish guilt in a speech case---e.g., the desire to produce an unlawful result; knowledge that an unlawful result is likely, coupled with a willingness, although not necessarily a desire, to bring it about; recklessness in overlooking the high probability that one's action (i.e., speaking or publishing) will produce an unlawful result; or negligence in overlooking at least some probability that one's action will produce an unlawful result.

In British law, contemporary commentators emphasize that intent to cause a breach of the peace is a condition of conviction for the offense of seditious libel, but the case law is sparse and ambiguous. In R. v. Burns, Cave, J., instructed the jury, in a case involving speeches to unemployed persons in London in 1886, that

> if you think that these defendants...had a seditious intention to incite the people to violence,...then undoubtedly you ought to find them guilty....On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed---if they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.[33]

After this somewhat tendentious summing up---in which the judge all but invited the jury to decide the fate of the defendants on the basis of the goodness of their motives rather than the content and likely effect of their words---the jury returned a verdict of not guilty.[34] A summing up with a contrary content---and with a contrary result, that is, conviction of the defendant---was delivered in R. v. Aldred, a 1909 case involving a charge of advocating political assassination for the purpose of securing Indian independence. "The test," according to Coleridge, J.,

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33 [1886] 16 Cox 355, 363.

34 Id. at 367.

> is not either the truth of the language or the innocence of the motive with which [the defendant] published it, but the test is this: was the language calculated, or was it not, to promote public disorder or physical force or violence in a matter of state?[35]

Presumably, Aldred is the correct statement of the law, for if it were otherwise, words which were clearly inciteful in content and probable effect might go unpunished---at least in principle, although perhaps very seldom in practice---owing to the sympathetic motives of the defendant. Thus, an objective test of the unlawful character of speech---based on its content and the circumstances in which it is delivered---seems necessary. Moreover, the culpability of the speaker will presumably have to be measured by the standard of a reasonable man. In other words, provided the defendant is aware of the content of his speech and the circumstances in which it is being delivered and is a person of normal mental capacity, he will be guilty if he should have known that his words were likely to produce unlawful action. A serious ambiguity remains in the British law of seditious libel, however, because of the failure of the law to clearly separate the issue of the content of speech from the issue of the effects of speech and to clearly specify a conjunctive test of unlawful speech. In the words of one commentator, there has been a "narrowing of sedition in the recent period," but the fact remains that "everything depends on circumstances and on the objective test of mens rea, and, by the test which includes intention and recklessness, advocacy of reform by peaceful means may yet amount to sedition if violence is a sufficiently foreseeable reaction."[36]

D. The Content of Speech Punishable as Seditious Libel

The ease with which advocacy of change or criticism of established institutions can be transmuted into the offense of seditious libel has led American

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[35] [1909] 22 Cox C.C. 1, 3.

[36] Brownlie, supra note 1, at 89.

courts to adopt a two-part "objective" test of constitutionally punishable advocacy which specifies that speech, to be punishable, must be "directed to inciting or producing imminent lawless action" and must be "likely to incite or produce such action."[37] Thus, speech, to be punishable, must satisfy both a potentially stringent content requirement and a potentially stringent likelihood requirement. The nature of the requisite intent remains obscure, but, presumably, if the speech itself satisfies the Brandenburg requirements, the government---depending on the strength of its evidence and the severity of the punishment it wishes to see imposed---is free to try to establish that the defendant, when he used the words he did, desired a violent or unlawful result, knew that such a result was likely, should have known that such a result was highly likely, or should have known that such a result was at least somewhat likely. In British law, the courts have never specified what speech content will or will not be punishable as seditious libel. However, commentators, as opposed to courts, have urged that sedition should be "[confined] to actual incitement to violence."[38] Moreover, the crime of sedition may be eliminated altogether and replaced by reliance on statutory and common law offenses involving incitement to violence or other specifically unlawful acts. If this occurs, British law, like American law, will presumably begin to focus more closely on the issues of the content of speech, the circumstances in which speech is delivered, and the clarity and closeness of the connection between speech and action.

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37 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

38 Brownlie, supra note 1, at 89.

II. Defamatory Libel

The first task in discussing the crime of defamatory libel in Anglo-American law is to isolate the crime itself. Obviously, there is a considerable degree of potential overlap between defamatory libel and other offenses. Indeed, in English law, it appears that

> [n]ot until the nineteenth century did the distinction between defamatory, seditious and blasphemous libel become as clear-cut as it is today. Before then, a published attack on a high state official, for example, might be prosecuted as either a seditious or a defamatory libel, and an attack on the Church or its doctrine might be prosecuted as either a blasphemous or a seditious libel.[39]

If we define seditious libel as speech directed at governments or social conditions in general---whether in the form of advocacy of overthrow of the government or the creation of discontent through criticism of existing conditions---a category of speech clearly remains which consists of criticism directed at individual public officials. In American law, the legal remedies available to punish or inhibit such speech include a criminal prosecution for defamatory libel or a civil suit for defamatory libel. In British law, the picture is somewhat more complicated. It is possible for the government to bring a criminal prosecution against a defendant who has allegedly defamed a particular official. In addition, the public official is entitled to bring a civil suit. Finally, however, there exists in Britain the possibility of a private prosecution for defamatory libel. Such prosecutions may be brought by purely private citizens or by public officials. They have become relatively rare---numbering no more than one or two per year in recent years---apparently because they are subject to a screening process which requires either the consent of a judge in chambers or the willingness of the police to participate in the prosecution process.[40] How-

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[39] Spencer, "Criminal Libel---A Skeleton in the Cupboard (1)," [1977] Crim. L. Rev. 383, 384 (1977).

[40] Id. at 387-94.

ever, the continuing availability of private prosecutions for defamatory libel is disturbing to some commentators, in part because such prosecutions in the past occasionally were used "to punish persons who in good faith sought to raise issues of public importance."[41]

For purposes of comparing current British and American law, we will focus on the criminal prosecution of defamatory libel in cases involving criticism of individual public officials. More specifically, British and American law will be compared with reference to (1) the requirement of a breach of the peace, (2) the content of speech punishable as defamatory libel, and (3) intent and the burden of proof in criminal prosecutions for defamatory libel.

A. The Requirement of a Breach of the Peace

The likelihood of a breach of the peace does not appear to be an element of the offense of defamatory libel in either Britain or the United States. In Britain, the crime of defamatory libel was created in order to provide a substitute for physical revenge. Over time, however, the likelihood of a breach of the peace came to be assumed rather than proved in criminal defamation cases,[42] and the necessity of proving the likelihood of a breach of the peace was formally ended by a decision of the Court of Criminal Appeal in 1936.[43] In the United States, criminal prosecutions for defamatory libel are evidently rare, even though, in 1952, "every American jurisdiction...punish[ed] libels directed at individuals."[44] As in Britain, "the traditional justification for punishing

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41 Id. at 391.

42 Spencer, "Criminal Libel---A Skeleton in the Cupboard (2)," [1977] Crim. L. Rev. 465, 465-6 (1977).

43 Wicks, [1936] 25 Cr. App. R. 168. See generally Spencer, "Criminal Libel in Action---The Snuffing of Mr. Wicks," 38 Camb. L. J. 60 (1979).

44 Beauharnais v. Illinois, 343 U.S. 250, 255 (1952).

libels criminally [was] their 'tendency to cause breach of the peace'," [45] but in some states "injury to reputation, as in civil libel, and not tendency to breach of the peace, [was] the gravamen of the offense." [46] Criminal libel, whether or not it requires the likelihood of a breach of the peace, is probably a disfavored offense in American law---in 1966, the Supreme Court overturned on vagueness grounds a conviction for common law criminal libel in part because the offense involved "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se" [47] ---but in principle it appears that criminal libel is a viable offense and does not need to include a requirement of the likelihood of a breach of the peace in order to be constitutionally valid. [48]

In both British and American law, therefore, the "substantive evils" resulting from the publication of attacks on public officials---in particular, injury to reputation---appear to be sufficiently important in their own right to preclude any necessity of restricting the offense of defamatory libel to publications which are likely to produce a breach of the peace.

B. The Content of Speech Punishable as Defamatory Libel

In British law, the offense of defamatory libel---including defamatory libel of a public official---consists of the publication of a defamatory writing. If a defamatory statement is false, its author is without a legal defense. Moreover, even if the author can prove the truth of his statement, he must also

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45 Id. at 254.

46 Id. at n. 3.

47 Ashton v. Kentucky, 384 U.S. 195, 200 (1966). See generally Barnum, "Freedom of Assembly and the Hostile Audience in Anglo-American Law," 29 Am. J. Comp. L. 59 (1981).

48 Cf. Garrison v. Louisiana, 379 U.S. 64 (1964).

prove that "it was for the public benefit that the said matter charged should be published."[49] In American law, criminal prosecutions for defamatory libel are governed by constitutional limitations identical to those enunciated by the Supreme Court in New York Times v. Sullivan to "[delimit] a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."[50] In particular, the Times standard "absolutely prohibits punishment of truthful criticisms" of public officials and "forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false."[51]

Thus, in British law, defamatory libel is not restricted to false statements---let alone to false statements published with "knowledge of their falsity or in reckless disregard of whether they are true or false." Indeed, in British law, even true statements may be prosecuted, unless their author can prove that a public benefit will be derived from their publication. In American law, true statements---as long as they concern "anything which might touch on an official's fitness for office"[52] ---are constitutionally protected,[53] as

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49 Libel Act 1843, Section 6. Cf. Spencer, supra note 42, at 465-70.

50 376 U.S. 254, 283 (1964).

51 Garrison v. Louisiana, 379 U.S. 64, 78 (1964).

52 Id. at 77.

53 On the issues of the right of privacy raised by the publication of truthful but intimate facts about public figures or private citizens, see generally Report of the Committee on Privacy ("Younger Report"), Cmnd. 5012 (1972); R. Wacks, The Protection of Privacy (London: Sweet & Maxwell, 1980).

are false statements which do not also satisfy the "actual malice" standard of New York Times.[54]

C. Intent and Burden of Proof in Defamatory Libel

In Britain, if a defendant publishes matter which is defamatory and true, he will be guilty even though he did not desire to defame anyone. Moreover, he will be guilty even though he did not know that his published statements would defame anyone, and this is true even if his lack of knowledge was not due to recklessness but merely to negligence. Thus, while a British defendant is not strictly liable for the publication of a true but defamatory statement, he is liable for the negligent publication of such a statement. In addition, of course, even though the defendant is able to satisfy his burden of proving that the defamatory statement he published is true---and under the law, he must prove "the strict, literal truth of every thing he said"[55] ---he must also establish that the publication of the defamatory statement was to the public benefit. Since the judge or jury decides whether the publication was in fact to the public benefit, the defendant is free to proclaim his intention to benefit the public, but he will lose if the judge or jury doubts his profession of intent or the reasonableness of his belief in the public benefit of his publication, and he may even be guilty if his belief in the public benefit of his publication was reasonable but erroneous, that is, he may be strictly liable for the publication of true but defamatory statements which are not in fact to the public benefit. There is, on the other hand, strict liability for the publication of matter

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[54] Private individuals are not obliged, after Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), to meet the rigorous standard of New York Times. The Supreme Court in Gertz held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. at 347.

[55] Spencer, supra note 42, at 470.

which is defamatory and false, and the defendant will be guilty "however reasonable was his belief that [the matter] was true, and no matter how great would have been the public benefit in publishing it if it had been true."[56]

In the United States, of course, the rule after New York Times is that the publication of true but defamatory statements about a public official---so long as they relate to his official conduct---is absolutely privileged, and even false statements are not punishable unless the prosecution is able to establish that they were published with knowledge of their falsity or in reckless disregard of whether they are true or false. Thus, false statements published on the basis of a reasonable belief in their truth---or even on the basis of an unreasonable belief in their truth, as long as it does not amount to reckless disregard of whether the statements were true or false---are entitled to constitutional protection.[57]

D. Conclusion

In New York Times v. Sullivan and subsequent cases, the Supreme Court created an absolute privilege to publish truthful statements---even if defamatory---about those aspects of the life of a public official which might touch upon his or her fitness for office. Moreover, the Court required proof of "actual malice" in order to uphold a criminal conviction or a civil judgment for the publication of defamatory falsehood. The Court summarized its reasons

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[56] Id. at 469.

[57] "Reckless disregard" was defined by the Supreme Court, in Herbert v. Lando, 99 S.Ct. 1635, 1639 (1979), as a situation in which "the defendant 'in fact entertained serious doubts as to the truth of his publication' [quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)]. Such 'subjective awareness of probable falsity' [quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n. 6 (1974)] may be found if 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his report' [quoting St. Amant v. Thompson, at 732]."

for bringing the civil and criminal law of defamatory libel under the protection of the Constitution when it said, in 1979, that

> [New York Times and its progeny] rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press and that to avoid self-censorship it was essential that liability for damages be conditioned on the specific showing of culpable conduct by those who publish damaging falsehood. Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press.[58]

In Britain, the use of criminal prosecutions to suppress legitimate criticism of individual public officials may not, in practice, represent a grave threat to freedom of speech and freedom of the press. Nevertheless, the possibility of governmental and private prosecutions for defamatory libel does exist, and beginning in 1976, with the private prosecution of Private Eye by Sir James Goldsmith,[59] there has been at least a modest revival of private prosecutions. This revival has prompted the leading authority on defamatory libel in Britain to comment that "the present rules sometimes penalise persons...who make an honest attempt to expose a public scandal which they reasonably believe to exist. Such a person falls all to easily through the gaps that exist between the various defences."[60] Given the fact that in Britain defamatory falsehood is readily punishable and that even defamatory truth is only immune from punishment if its publication is to the public benefit, this assessment would seem, if anything, to be an understatement. Whether the courts or other constitutional decision-making institutions in Britain will change the criminal law of defama-

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58 Herbert v. Lando, 99 S.Ct. 1635, 1640-1 (1979).

59 Cf. Spencer, supra note 43, at 60. Cf. also Goldsmith v. Sperrings Ltd. and others, [1977] 1 W.L.R. 478 (dismissing an appeal by distributors of Private Eye, with whom Goldsmith was attempting to reach a settlement whereby they would cease to handle Private Eye in exchange for his agreement to cease his action against them for distribution of the offending issues of the magazine).

60 Spencer, supra note 42, at 469.

tory libel to reduce its potential to threaten freedom of speech and freedom of the press---as the U.S. Supreme Court did in New York Times, when the potential threat to freedom of speech and press posed by the traditional law of civil defamation became a reality---remains to be seen.

II. Blasphemous Libel

In 1976, Mrs. Mary Whitehouse of the National Viewers' and Listeners' Association in Britain commenced a private prosecution for common law blasphemous libel against the editor of a homosexual newspaper for publishing a poem "describing, as a sort of allegory of religious experience, 'acts of sodomy and fellatio with the body of Christ immediately after the moment of his death.'"[61] The conviction was upheld by the House of Lords by a three to two vote in 1979.[62] The crime of blasphemous libel of course does not exist in the United States. However, the poem from which the conviction resulted undoubtedly would violate various American statutes or other types of proscriptions aimed at "offensive speech," and therefore it may be beneficial to try to compare the British and American approaches to the general problem of offensive speech, including offensive speech in the form of blasphemous libel. We will focus in turn upon four topics: (1 the requirement of a breach of the peace; (2) the content of punishable speech; (3) the question of intent; and (4) the circumstances in which offensive speech may be punished.

A. The Requirement of a Breach of the Peace

The House of Lords in Whitehouse v. Lemon rejected the proposition that a conviction for blasphemous libel is invalid unless the utterances of the

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[61] Spencer, "Blasphemous Libel Resurrected---Gay News and Grim Tidings," 38 Camb. L. J. 245, 246 (1979).

[62] Whitehouse v. Lemon; Whitehouse v. Gay News Ltd., [1979] 2 W.L.R. 281.

defendant are likely to cause a breach of the peace.[63] In American law, the constitutional status of offensive speech which is unlikely to provoke a breach of the peace remains unsettled. However, the Supreme Court indicated in 1942 that one of the categories of speech which "has never been thought to raise any Constitutional problem" includes not only words which "tend to incite an immediate breach of the peace" but also words which "by their very utterance inflict injury."[64] More recently, Justice Powell argued on behalf of himself and two other justices that

> the exception to First Amendment protection recognized in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.[65]

Thus, in American law it seems possible that offensive speech, even though it is unlikely to provoke a breach of the peace, is, at least under certain circumstances, constitutionally unprotected.[66]

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63 Cf. id. at (per Lord Edmund Davies) and (per Lord Scarman).

64 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

65 Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972)(Powell, J., dissenting).

66 See also the pointed reservation, in Cohen v. California, 403 U.S. 15 (1971), of the question of state power to punish offensive speech under certain circumstances:

> [I]f Cohen's "speech" were otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor....

Id. at 22 (emphasis added).

B. The Content of Punishable Speech

In the 18th century and before, the offense of blasphemy in Britain consisted of "words challenging or questioning the doctrines of the established church,"[67] but by the latter part of the 19th century, it was no longer

> blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves.[68]

In American law, one finds a similar emphasis on the need to distinguish in principle, / however difficult it may be to do so in practice, between the expression of ideas offensive to some because of their content and the use of language which is offensive in its own right. In Cohen v. California, for instance, the Court was emphatic that

> the State certainly lacks power to punish Cohen for the underlying content of the message the inscription ["Fuck the Draft"] conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.[69]

Thus, both the British and American constitutional systems have sought to draw a distinction between offensive ideas and offensive language. The latter, in principle, may be punished, while the former, in principle, may not.

C. The Question of Intent

The point of law certified to the House of Lords for its decision in Whitehouse v. Lemon was whether the Court of Appeal had been correct in upholding the direction to the jury of the trial judge that

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67 Whitehouse v. Lemon, supra note 62, at (per Lord Scarman).

68 Id. at (per Lord Scarman), quoting Stephen's Digest of the Criminal Law (9th ed. 1950), Art. 214.

69 Cohen v. California, supra note 66, at 18.

> (1) it was sufficient [for conviction] if the jury took the view that the publication complained of vilified Christ in His life and crucifixion; and (2) it was not necessary for the Crown to establish any further intention on the part of the appellants beyond an intention to publish that which in the jury's view was blasphemous libel.[70]

The House of Lords, by a vote of three to two, rejected the claim of the appellants that the trial judge should have instructed the jury that the Crown was obliged to establish a specific intention

> to attack the Christian religion so violently or scurrilously as to insult the adherents of the Christian religion to such an extent that a breach of the peace is likely.[71]

The House of Lords thus rejected the argument that the likelihood of a breach of the peace was an element of the offense of blasphemous libel and held that the offense consisted of publishing matter which "vilified Christ in His life and crucifixion," regardless of the absence of any likelihood of a breach of the peace. In addition, the House of Lords held that it was "not necessary for the Crown to establish any further intention on the part of the appellants beyond an intention to publish," thus rejecting the argument that the Crown was obliged to establish an intention either to cause a breach of the peace or to commit blasphemy defined as publishing matter which vilified Christ. The net result of the decision of the House of Lords, therefore, is that the standard of criminal responsibility in blasphemous libel---defined as the utterance or publication of words which vilify Christ, whether or not they create the likelihood of a breach of the peace---is that of a reasonable man. In other words, any person of normal mental capacity who is not for some reason ignorant of primary facts which would make his words offensive---i.e., who is not unfami-

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70 Whitehouse v. Lemon, supra note 62, at (per Lord Scarman).

71 Id. at .

liar with the English language and the meaning of the words he is speaking or writing---will be guilty of the crime of blasphemy if he should have known that publication of his words constituted vilification of Christ and would offend the sensibilities of ordinary Christian believers. He will not, therefore, be able to prevail with the claim that he did not intend to offend the sensibilities of others by vilifying Christ---but had some other, more acceptable intention---if the jury is satisfied that he should have known that the words he chose to use would have that effect.

The American law of offensive speech appears to take the same position on the issue of intent. Assuming it is possible to devise an "objective test" of offensive speech, if that test is satisfied by a defendant's utterance of certain words under certain circumstances, the defendant will not be allowed to make the claim---or at least the jury will not be allowed to consider the defendant's claim, if made---that he had some intention other than giving offense to sensibilities by his speech.

What this seems to reveal about the role of intent in the development of constitutional policy governing speech offenses is that provided the definition of the offense itself is settled---and provided an acceptable justification can be found for making certain activity an offense, regardless of the adverse consequences of doing so on the scope of freedom of speech---a specific intent to commit the offense will no longer be required, because to do so would be to allow the defendant to re-introduce objections to the definition of the offense or to the merits of making certain activity an offense in the first place. The uneasiness that an American observer may feel about the refusal of the House of Lords in Whitehouse v. Lemon to permit the jury to hear or consider the defendant's arguments about his true intentions is perhaps at base an uneasiness

about the substantive merits of the offense of blasphemy. However, once the functional similarity between the offense of blasphemy in English law and offenses based on the utterance of offensive language in American law is recognized, it becomes easier to separate the issue of the substantive legitimacy of such speech-related offenses from the issue of the nature of the intent which the state should be required to establish in order to prove commission of the offense.

D. The Circumstances in which Offensive Speech May be Punished

American law is evidently moving in the direction of accepting a rationale for the punishment of offensive speech which focuses on the circumstances in which such speech is communicated and the resulting degree of invasion of the privacy of others. In Cohen v. California, Justice Harlan argued in his opinion for the Court that

> the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.[72]

The Court has barely begun to identify the circumstances in which it might be willing to hold that substantial privacy interests <u>are</u> being invaded in an essentially intolerable manner, but in order to be constitutionally permissible, the punishment of offensive speech in American law will probably have to be based on the satisfaction of some variation of this rationale.[73]

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72 Cohen v. California, 403 U.S. 15, 21 (1971).

73 Cf. Rowan v. United States Post Office Dept., 397 U.S. 728 (1970)(householder has unlimited power to prohibit the mailing to him of matter to which he objects on grounds of content or language); Cohen v. California, supra note 66; Rosenfeld v. New Jersey, 408 U.S. 901, 906 (1972)(Powell, J., dissenting) ("a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription"); Erznoznik v. Jacksonville, 422 U.S. 205, (1975)("the limited privacy inter-

The rationale for punishing blasphemous libel in British law, as articulated by Lord Scarman in his opinion in Whitehouse v. Lemon, is that "[i]n an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt."[74] Such a rationale could be interpreted to permit the state to punish offensive language---whether or not it was associated with or aimed at religious feelings or opinions---only when it was used in circumstances where it would constitute an intolerable invasion of the privacy interests of unsuspecting or unwilling listeners or viewers. As articulated by Lord Scarman, however, the "plural society" rationale obviously has broader connotations and represents an attempt by the law to regulate the overall tone of public discourse and to minimize, in a general way, the possibility that unsuspecting or unwilling parties will be confronted with offensive language in their daily lives. The "shortcoming" of permitting the government to punish offensive speech solely "in order to maintain what [it regards] as a suitable level of discourse within the body politic" were emphasized by Justice Harlan in his opinion in Cohen v. California.[75] The view of a majority of the House of Lords in Whitehouse v. Lemon, however, was that rejection of such a

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ests of persons in the public streets cannot justify...censorship [in the form of an ordinance prohibiting drive-in theaters with screens visible from public streets from showing films containing nudity] of otherwise protected speech on the basis of its content"); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (ability of radio broadcasts to confront the citizen in his home and to reach children is sufficient to justify FCC regulation of patently offensive words used over the air).

74 Whitehouse v. Lemon, supra note 62, at (per Lord Scarman).

75 Cohen v. California, 403 U.S. 15, 23-4 (1971).

rationale would represent "no way forward for a successful plural society."[76] Thus, the American constitutional system has, at least tentatively, chosen a more narrow rationale on which to base the scope of legal intervention in the problem of offensive speech than has the British constitutional system. The exact effect of these choices on the contours of constitutional protection of offensive speech in Britain and the United States remains, however, very much to be seen.

IV. Group Libel or Incitement to Racial Hatred

Parliament in 1965 enacted a law---Section 6 of the Race Relations Act 1965---which made it an offense for any person "with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins [to publish or distribute written matter or use words] which are threatening, abusive or insulting, being matter or words likely to stir up hatred."[77] In 1976, the Act was amended to eliminate the requirement of an intent to stir up hatred, and in its present form the law punishes the publication or distribution of written matter or the use of words which are threatening, abusive or insulting "in a case where having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain."[78] The views of Sir Leslie (now Lord) Scarman were in part responsible for convincing the government to change the law. He had argued in 1974 that the Race Relations Act, because it was "[h]edged about with restrictions"---including the need to prove intent---was "useless to a

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[76] Whitehouse v. Lemon, supra note 62, at (per Lord Scarman).

[77] Race Relations Act 1965, Section 6.

[78] Race Relations Act 1976. This provision is codified as Section 5A of the Public Order Act 1936.

policeman on the street."[79] The government, noting that in the decade after 1965 there had been "a decided change in the style of racialist propaganda" and that such propaganda "tends to be less blatantly bigoted [and] to disclaim any intention of stirring up racial hatred," recommended and achieved elimination of the necessity under the law of proving "a subjective intention to stir up racial hatred."[80]

The status of the offense of incitement to racial hatred is ambiguous in American law. The Supreme Court upheld a group libel statute in Beauharnais v. Illinois in 1952.[81] However, First Amendment law in general, as well as First Amendment law affecting the crime of incitement in particular, has undergone a substantial amount of development since that time. As a result, lower courts have expressed serious doubts about the continuing validity of the Beauharnais decision.[82]

As with the offense of blasphemous libel, it is helpful to compare British and American law in terms of (1) the requirement of a breach of the peace; (2) the content of punishable speech; (3) the question of intent; and (4) the circumstances permitting punishment of incitement to racial hatred.

A. The Requirement of a Breach of the Peace

There is not and never was a breach of the peace requirement in the British law directed at punishing incitement to racial hatred. Neither the Race Rela-

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79 Report on the Red Lion Square Disorders ("Scarman Report"), Cmnd. 5919 (1974), p. 35.

80 White Paper on Racial Discrimination, Cmnd. 6234 (1975), p. 30.

81 343 U.S. 250 (1952).

82 See Section A infra.

tions Act 1965 nor the Race Relations Act 1976 requires a breach of the peace. The substantive offense under both statutes is the stirring up of racial hatred by the use of words which are threatening, abusive or insulting. The U.S. Supreme Court in Beauharnais v. Illinois was urged to hold that incitement to racial hatred could not be punished in the absence of proof of clear and present danger of a breach of the peace, but the Court refused to do so. "Libelous utterances not being within the area of constitutionally protected speech," the Court said, "it is unnecessary...to consider the issues behind the phrase 'clear and present danger.'"[83] Beauharnais has never been overruled. However, in the litigation surrounding the proposed Nazi march in Skokie, Illinois, lower federal courts were obliged to rule on the constitutionality of a Skokie ordinance which prohibited, irrespective of the likelihood of a breach of the peace, the dissemination of any material "which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so."[84] The District Court noted that "[t]he standards which the courts apply in determining whether a particular statute has [an inhibiting effect on free debate] have undergone considerable evolution since Beauharnais,"[85] and the Court concluded that "after New York Times and Garrison, the [Supreme] Court views speech which defames racial and religious groups merely as a special category of language likely to cause breaches of the peace."[86] The Court of Appeals also insisted on viewing Beau-

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83 Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

84 Collin v. Smith, 447 F.Supp. 676, 686 (N.D. Ill. 1978).

85 Id. at 695.

86 Id. at 697.

harnais, in retrospect, as a decision whose "rationale...turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder,"[87] and the Court concluded that insofar as Beauharnais "implicitly sanctions prohibiting the use of First Amendment rights to invoke racial or religious hatred even without reference to fears of violence," it is doubtful "the [the decision] remains good law after the constitutional libel cases."[88] Thus, it seems clear---although it is essential to remember that the Supreme Court itself has not yet had occasion to rule on the issue---that laws punishing incitement to racial hatred, if they do not require proof of the likelihood of a breach of the peace, are unconstitutional.

B. The Content of Punishable Speech

An additional reason why a law prohibiting incitement to racial hatred would have difficulty passing constitutional muster in the United States today is that the possibility of arriving at a statutory definition of prohibited speech which is sufficiently precise to withstand an attack on grounds of vagueness seems remote. In American law, the impetus for requiring both a breach of the peace and a clear and present danger that speech may produce such a result is undoubtedly to eliminate the possibility, in certain areas of constitutional policy, that statutory definitions of speech-related offenses will reflect ill-considered assumptions about the proper uses of the criminal sanction and will, because of their vagueness, have an unacceptably inhibiting effect on freedom of speech.

Under the British Race Relations Act 1976, the content of punishable speech is defined as words which are "threatening, abusive or insulting" and

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87 Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).

88 Id. at 1205.

are likely, having regard to all the circumstances, to stir up racial hatred. British appellate court decisions are not exceptionally edifying on the subject of what speech qualifies as threatening, abusive or insulting---one member of the House of Lords has declared that the statutory term "insulting" as used in Section 5 of the Public Order Act 1936, "means insulting and nothing else,"[89] while another has expressed his opinion that "'insulting' is an ordinary uncomplicated English word"[90] ---and trial court decisions under the Race Relations Act are not very helpful either, because convictions for violating the law---of which there were 15 (out of 24 prosecutions) under the old law and 9 (out of 15 prosecutions) under the new law (up to April 1980)---are seldom reported in detail or appealed to higher courts. Thus, the precise content of racial propaganda regarded as punishable under the law remains somewhat unclear.

C. The Question of Intent

It is unnecessary to prove a specific or subjective intent to stir up racial hatred---let alone to incite or provoke a breach of the peace---under the British Race Relations Act 1976. Presumably, this does not mean that there is strict liability under the law---that is, that a defendant can be convicted irrespective of his mental capacity or his ignorance of the primary facts that made his statements likely to stir up racial hatred---but it does mean that an adult of normal mental capacity can be convicted of incitement to racial hatred if a jury is convinced that he should have known that his use of certain words---provided they can be characterized as threatening, abusive or insulting---was likely, having regard to all the circumstances, to stir up racial hatred.

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89 Brutus v. Cozens, [1972] 3 W.L.R. 521, 527 (per Lord Reid).

90 Id. at 530 (per Lord Kilbrandon).

Assuming, arguendo, that the punishment of speech merely because it is likely to stir up racial hatred would be constitutionally permissible in American law, it is probable that American law would mirror British law in establishing the level of intent necessary to violate the law at failure to understand, as would a reasonable man, that the words one has chosen to use in public were likely to stir up racial hatred. Once the objective definition of a speech offense is relatively clear and the justification for its punishment has received the imprimatur of a constitutional court, it makes no sense for a legal system to permit defendants to argue to a jury that their motives were pure or their actions, although illegal, were justified or at any rate should be entitled to constitutional protection. Indeed, it was, historically, precisely such arguments which had, in both English and American law, the unwelcome effect---unwelcome, that is, from the point of view of the government or defenders of the established order---of undermining the constitutional legitimacy of the offense of seditious libel or at least causing the definition of the offense to be narrowed.

D. The Circumstances Permitting Punishment of Incitement to Racial Hatred

At this juncture of its constitutional and social history, Britain, as an "increasingly plural society,"[91] has decided that permitting the publication or utterance of racialist propaganda will have a detrimental effect on achievement of the goal of racial harmony and racial peace. The U.S. Supreme Court in Beauharnais accepted a similar justification for the Illinois group libel statute at issue in that case when it decided that it was constitutionally permissible for Illinois "to conclude that wilful purveyors of falsehood

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[91] Whitehouse v. Lemon, supra note 62, at (per Lord Scarman).

concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[92] In the years since Beauharnais, the emphasis in American constitutional law on the importance of freedom of speech has produced a requirement---not yet officially recognized by the Supreme Court but accepted in the meantime by at least some lower courts---that incitement to racial hatred, to be punishable, must in fact constitute incitement to racial violence and must be accompanied by the objective likelihood of such violence. In this area of the law, therefore, as in the area of the law concerned with offensive speech, it appears that Britain has chosen a broader rationale on which to base the power of Parliament and the courts to interfere with speech than has the United States. Implicit in this choice are many of the same assumptions---theoretical assumptions about the relative importance of free speech and public order, as well as empirical assumptions about the efficacy of the law as an instrument of control of expressive activity and about the contribution of restrictions on speech to the development of political tolerance and political stability---which have informed the British approach to other free speech issues---and have differentiated that approach from the American approach.

V. Conclusion

The implications of the choices made by a constitutional system in connection with free speech issues are, unfortunately, not only momentous but also controversial and, what is perhaps worse, highly speculative. It seems clear from this review of the constitutional status of four offenses---seditious libel,

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[92] Beauharnais v. Illinois, 343 U.S. 250, 259 (1952).

defamatory libel, blasphemous libel, and incitement to racial hatred---that in every case the British law is more restrictive of freedom of speech---or at least is based on assumptions which are potentially more restrictive of freedom of speech---than is the American law. The full empirical verdict on the actual, everyday status of freedom of speech and freedom of the press in Britain and the United States has yet to be returned. At the level of formal constitutional policy, however, the differences between the constitutional status of freedom of speech and freedom of the press in Britain and the United States---many of which have emerged only in the last few years---seem striking indeed.